STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-20-181

AVANGRID NETWORKS, INC.
Plaintiff/Appellant

INDUSTRIAL ENERGY CONSUMER GROUP and MAINE STATE CHAMBER OF COMMERCE
Plaintiff-Intervenors/Appellants

v.

MATTHEW DUNLAP, in his official capacity as Secretary of State for the State of Maine
Defendant/Appellee/Cross-Appellant

MAINERS FOR LOCAL POWER and NINE MAINE VOTERS
Defendant-Intervenors/Appellees/Cross-Appellants

NEXTERA ENERGY RESOURCES, LLC
Defendant-Intervenor/Appellee

On Appeal from Cumberland County Superior Court
Docket No. 20-206

BRIEF OF APPELLANT INDUSTRIAL ENERGY CONSUMER GROUP

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INTRODUCTION

This case asks whether the citizens of Maine should be presented with a ballot question that purports to be a citizen initiative, but in fact seeks to do something the people do not have the power to do by initiative. The initiative at issue (the "Initiative") on its face violates the Constitution's separation of powers, as it orders the reversal of a decision of the Public Utilities Commission, subsequently affirmed by this Court, granting a certificate of public convenience and necessity to build and operate a transmission line.[1] Because the Legislature does not have the power to command an executive branch agency in this fashion, neither do the people acting by citizen initiative. The Initiative does not even pretend to be an exercise of legislative power, but instead seeks to wield powers the Constitution gives to the other branches of Maine's government.

The Constitution's initiative provisions return the *legislative* power to the people; they do not permit the people to exercise executive or judicial power or to alter the balance among the three branches of government. The separation of powers is foundational to our democracy, and neither the Legislature itself, nor the citizens exercising their legislative power, may disturb the balance the Constitution creates.

[1] *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, 227 A.3d 111.

Rather than making or amending a law, the Initiative brazenly directs the reversal of one specific decision of an executive branch agency that has been affirmed on appeal by the judicial branch, and demands that the agency issue a new decision with specific contrary findings dictated by the Initiative. Because the initiative is a mechanism for the people to exercise legislative power, not executive or judicial power, this violates the principle of separation of powers, made explicit in Article III, on which Maine's constitutional government is based. If the Initiative is not something the people have the power to accomplish by legislation, only harm can flow from allowing it to appear on the ballot. To safeguard the public trust in the integrity of democracy, citizens deserve to know the truth now, before they engage with the issue and cast their votes.

Permitting the Initiative to go forward would violate the constitutional balance of powers and jeopardize the stability, certainty and finality of the system for making regulatory decisions that has been carefully constructed on that three-part foundation. Not saying so now would erode public confidence in the ballot initiative process by sanctioning a pointless election that is destined to be overturned, after yet another lawsuit, if the Initiative prevails. It would establish the precedent that a fully permitted and judicially sanctioned project may be delayed for up to a year by a facially invalid use of

the initiative process. And it would invite a return of the chaos of the colonial era, when "colonial assemblies and legislatures," laboring under "the ruins of a system of intermingled legislative and judicial powers, which . . . had produced factional strife and partisan oppression," would simply "correct the judicial process through special bills or other enacted legislation . . . ." *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 219 (1995). Maine's Constitution expressly forbids revisiting that failed experiment.

STATEMENT OF THE FACTS

IECG elaborates on Avangrid's statement of the facts, which IECG adopts, only to explain its interest in this case. IECG's members are large Maine industrial energy consumers who must obtain and maintain multiple Maine executive branch permits, any of which might be collaterally attacked under the theory of the Initiative by anyone (here, fossil fuel interests who will compete with and thus oppose the NECEC project) with enough money to collect the signatures needed to get an initiative on the ballot with the aim—at a minimum—of delaying the construction of an infrastructure project for up to a year as the pendency of the initiative freezes it in place. (A. 140, IECG Complaint.) IECG's members have an interest in preserving the finality of executive branch decisions, especially those that have survived judicial review, against this unprecedented form of political attack. *Id*. ¶ 2. IECG's

members need administrative permits to do business in Maine, and rely on the quality, integrity, and finality of Maine's regulatory and judicial processes to make critical investment decisions. IECG members know that regulatory programs which lack stability, certainty and finality will soon have little to regulate. The Initiative would evaporate the reasoned decision of an expert Maine regulatory agency, the PUC, that was based on sworn testimony and cross-examination of experts and guided by science, law, analysis, and reason over nineteen months. It would relegate to politics, rather than to expert regulators, decisions about one specific large and complex project that would (the PUC found) reduce electricity costs, enhance the reliability of the electric grid, and mitigate climate impacts. *See id*.; *see also NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶ 30, n. 14, 227 A.3d 111

If allowed to proceed, the Initiative would cause regulatory chaos for the NECEC project and would portend chaos for other infrastructure projects in Maine that require permits. The message sent by the Initiative, if it proceeds to a vote, would be that regulatory permits earned after years of proceedings, costing millions of dollars, and affirmed on appeal may have little or no real value. Looking to the future, letting the Initiative go forward would signal that the ballot initiative process could henceforth be used, not just to reverse a project after approval, but even to approve a project in the first

instance or to override a permit denial. Future developers could bypass agencies charged with using their expertise to advance the public interest and instead take their projects directly to the voters. This is not a formula for the intelligent allocation of scarce public and private resources in Maine.

STATEMENT OF THE ISSUE

Should a measure that purports to be a citizen initiative, but in fact is unlawful because rather than being legislative in nature it directs the reversal of a final decision by an executive branch agency that has been affirmed on appeal by the judicial branch, appear on the November ballot?

SUMMARY OF THE ARGUMENT

The initiative provisions in the Maine Constitution return the *legislative* power to the people; they do not enable the people to exercise executive or judicial power, or to alter the balance among the three branches of government. The Initiative at issue here violates the separation of powers because it is not in any sense legislation. Rather than establish a general rule of prospective application, the Initiative orders the PUC to reopen a final order that this Court has affirmed on appeal and replace its findings with contrary findings dictated by the Initiative. The Initiative identifies no new evidence or changed circumstances to support its preferred outcome, nor does it establish

a new legal standard. It simply directs the PUC to reverse itself. That is not a power the people may exercise by initiative.

This Court's precedents and numerous decisions from other states indicate that if the Initiative is unlawful, the Court should say so now. The rule of *Wagner v. Sec'y of State* is that a purported initiative should not be submitted to the voters if it deals with "a subject matter beyond the electorate's grant of authority." 663 A.2d 564, 567 (Me. 1995). On its face, what the Initiative purports to do here is beyond the electorate's grant of authority, because the Initiative is not legislation. Instead, it tries to exercise powers that belong to the executive and judicial branches. There is no need to wait to see what effect the Initiative would have if it were to pass; its purpose and effect are unmistakable from its text. The question before the Court now—whether this unlawful Initiative should appear on the November ballot—is ripe for review under this Court's precedents.

The people should not be asked to vote on a ballot question they do not have the power to decide. Because the Initiative purports to do something the people cannot do, it would be improper and would mislead the voters to let it appear on the ballot. Putting an unlawful initiative on the ballot would also tend to frustrate and confuse voters, and in so doing erode public confidence in the initiative mechanism itself. This would damage the legitimacy of the

democratic process. And it would threaten the future of energy infrastructure investment in Maine, as the message sent if the Initiative were permitted to go forward would be that regulatory approvals issued by the State have no real finality. Any permit issued by the executive branch, even after it had been affirmed by the judicial branch, could be subject to reversal by legislative fiat. That is not how a constitutional system based on the separation of powers works.

ARGUMENT

The trial court made no factual determinations, but declined as a matter of law to review the Initiative. That decision interpreting the Maine Constitution is subject to *de novo* review. *State v. Elliott*, 2010 ME 3, ¶ 17, 987 A.2d 513, 519. A ripeness determination is also subject to *de novo* review. *Johnson v. Crane*, 2017 ME 113, ¶ 9, 163 A.3d 832, 834.

I. The Initiative is unlawful.

The question this case poses is not whether the substance of a piece of legislation enacted by initiative would pass constitutional muster. Rather, the question is whether the Initiative is even a piece of legislation in the first place, and thus lawfully within the people's initiative power. This is a threshold question, because "[w]hen the people enact legislation by popular vote," they engage in the "exercise of their sovereign power to *legislate*."

League of Women Voters v. Sec'y of State, 683 A.2d 769, 771 (Me. 1996) (emphasis added). It is a bedrock principle that a citizen initiative is a "means of exercising . . . legislative power" (*id*.), and that the initiative power "applies only to legislation, to the making of laws . . . . " *Moulton v. Scully*, 111 Me. 428, 89 A. 944, 953 (1914); *see also Reed v. Sec'y of State,* 2020 ME 57, ¶ 3, __A.3d__ ("The direct initiative process allows Maine voters to propose *legislation* for inclusion on a statewide ballot . . . ." (emphasis added)). If the Initiative is not legislation, then it is not a proper subject for a ballot initiative. *See* Me. Const. art. IV, § 1 ("the people reserve to themselves power to propose laws"). This threshold question should be decided now.

Legislation "must in its nature be general and prospective; a rule for all, and binding on all." *Lewis v. Webb*, 3 Me. 326, 333 (1825) ("It is the province of the legislature to make and establish *laws* . . . ."); *see also Prentis v. Atl. Coast Line Co*., 211 U.S. 210, 226 (1908) (Holmes, J.) ("Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.") Rather than establish a general rule of prospective application, the Initiative directs the PUC to amend a final order it previously issued by discarding its findings and replacing them with new, contrary findings dictated by the Initiative. A review of every initiative that has been the subject of an opinion by this Court

reveals that each one was either legislative in nature or proposed a constitutional amendment; none purported to do anything remotely like what the Initiative purports to do here. *See* Ex. A to IECG's Memo. in Support of Mot. for Preliminary Injunction (May 28, 2020) (table of cases). The Secretary of State too examined the history of initiatives, and the Office of the Attorney General explained at oral argument before the trial court that the Secretary "has not seen an initiative of this type before," and "did not find anything comparable." (Oral Argument Tr. 30:3-7, June 24, 2020.) Because the Initiative is not a lawful use of the people's legislative power, it should not appear on the ballot.

No party contends that the Initiative has any purpose other than to overturn a final decision of the PUC that was affirmed by this Court on appeal and direct it to enter contrary findings. The Initiative identifies no change in circumstances or new evidence, creates no new statutory standard for the PUC to apply, and establishes no procedure for the thirty-odd parties to the previous proceeding to be heard. Instead, the Initiative simply commands the PUC to reverse itself and issue a different ruling.

This Court has longstanding authority to rule on the scope of legislative power under the Maine Constitution:

> That the legislative branch of government under our tripartite system is subject to restrictions upon its authority, created by constitutional provisions, and that it is one of the proper functions of this court to define the limits of legislative power, are principles too generally recognized to require the citation of authorities.

Inhabitants of Warren v. Norwood, 138 Me. 180, 24 A.2d 229, 236 (1941). This form of judicial review goes back in Maine at least to 1825, when in *Lewis v. Webb* the Court held that the Legislature did not have the power to "set aside a judgment or decree of a Judicial Court, and render it null and void." 3 Me. 326, 332 (1825). The principle stated in *Webb* applies to a court decision affirming a final order of the PUC. *See id*. at 328–29 ("[T]he three great powers of government, the legislative, the executive, and the judicial, should be preserved as distinct from, and independent of each other . . . .").

The principle of separation of powers on which *Lewis v. Webb* is founded is "fundamental to our concept of democratic government." Harry P. Glassman, *Predicting What the Law Court Will Do in Fact*, 30 Me. L. Rev. 3, 5 (1978). "'Limitations [on legislative power] can be preserved in practice in no other way, than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.'" *Ex parte Davis,* 41 Me. 38, 51–52 (1856) (quoting Federalist No. 78 (Hamilton)).

This Court's obligation to police the outer boundaries of legislative power is invoked when the Legislature tries to interfere, *ultra vires*, with final decisions of courts or executive agencies. For instance, this Court has made clear that "valid and final decisions of the Workers' Compensation Board are subject to the general rules of res judicata and issue preclusion," and that a statutory amendment may not be "applied to alter an employee's level of benefits in cases when benefits have been previously established by decree or a binding agreement in the absence of changed circumstances." *Grubb v. S.D. Warren Co*., 2003 ME 139, ¶ 10, 837 A.2d 117, 120. Just as "[t]he Workers Compensation Act is uniquely statutory," *id*. at ¶ 19 (Clifford, J., dissenting), so is the PUC a statutory creation. *Grubb* makes clear that the fact that the PUC's authority is derived from statute does not mean that the Legislature has the power to overturn its final decisions. Here as in *Grubb*, "[t]he Legislature may not disturb a decision rendered in a previous action, as to the parties to that action," because "to do so would violate the doctrine of separation of powers." *Id.* at ¶ 11. If the Legislature cannot do so, neither can the people by initiative.

II. The Court should rule on the Initiative now.

Now is the time for the Court to rule on whether the Initiative is a lawful exercise of the people's legislative power. This conclusion is supported by (A) this Court's precedents; (B) the need to give Maine voters and the initiative

mechanism itself the respect they deserve; and (C) persuasive authority in other states.

A. This Court's precedents support ruling now on the lawfulness of the Initiative.

In declining to engage in pre-election review of the lawfulness of the Initiative the trial court properly focused on *Wagner v. Sec'y of State*, 663 A.2d 564 (Me. 1995), the leading case on the issue. But while *Wagner* rejected a pre-election challenge to a ballot initiative, its rationale supports pre-election review here.

The initiative in *Wagner* was, on its face, a piece of legislation: it proposed to enact a statute, to be codified at 5 M.R.S. § 4552-A, providing that "protected classes or suspect classifications under state or local human rights laws, rules, regulations, ordinances, charter provisions or policies are limited to race, color, sex, physical or mental disability, religion, age, ancestry, national origin, familial status, and marital status." 663 A.2d at 566, n. 3. The plaintiffs nevertheless argued that it should be kept off the ballot because it "purports to give the electorate the power to limit enactment of future laws in violation of Article IV, Part 3, Section 8," and thus amounted to amending the constitution—something the voters do not have the power to do by initiative. *Id*. at 566.

The Law Court rejected this argument for a simple reason: contrary to what the plaintiffs had claimed, "[o]n its face, the proposed initiative legislation is not a constitutional amendment." *Id*. at 567. Rather, the Court noted, "[i]t identifies itself as a statutory enactment that would be codified in Title 5 as section 4552-A." *Id*. Indeed, the proponents had conceded that the initiative "could not control future action by the Legislature," as a constitutional amendment would do, but could "only repeal existing protections . . . ." 663 A.2d at 567 ("On its face, it is not [a constitutional amendment], it is only a statutory amendment. It usurps neither the enacting powers of the Legislature nor the interpretive powers of the judiciary."). Of key significance here, because the proposed legislation was not an improper subject for an initiative on its face, the Court held that it could be put to the voters:

> The proposed initiative legislation does not present us with a subject matter beyond the electorate's grant of authority. It is thus an appropriate matter to be submitted to the voters of this State.

Id. at 567 (citations omitted). In short, because the proposed initiative was on its face legislation (a law), it was not beyond the electorate's grant of authority, and so could appear on the ballot.

Here, the Initiative does present the Court with "a subject matter beyond the electorate's grant of authority." It exceeds the people's power to

legislate under article IV, part 3, section 18 of the Maine Constitution, because it is not in any recognizable sense legislation. In directing the PUC to amend a final order it issued in a particular case to incorporate specific findings demanded by the Initiative, the Initiative fails to create "a rule for all," *Lewis*, 3 Me. at 333, but instead directs the reversal of a final decision in a single decided case involving just one applicant for one specific approval. In contrast to the initiative in *Wagner*, the Initiative does not even pretend to be legislation that establishes a general rule of prospective application to be codified as a Maine statute. Instead, it orders the PUC to change its decision on the NECEC transmission project:

> The amended order *must find* that the construction and operation of *the NECEC transmission project* are not in the public interest and that there is not a public need for *the NECEC transmission project*. There not being a public need, the amended order *must deny* the request for a certificate of public convenience and necessity for *the NECEC transmission project*.

(emphasis added). The contrast with the initiative in *Wagner* is unmistakable: while that measure was on its face legislation and within the electorate's grant of authority to legislate, the Initiative here simply commands another branch of government to take a specified action to reverse a final decision it had previously made, within its lawful authority, with respect to particular parties.

Its non-legislative character in violation of the separation powers is evident on the face of the Initiative.

In explaining why it would let the initiative in *Wagner* remain on the ballot, this Court made clear that the outcome here should be different. For the *Wagner* Court did in fact consider whether the initiative before it was categorically beyond the power of the voters to decide, and determined that it was not:

> The success of [the] argument [that the controversy was ripe for review] would require us to conclude that the proposed legislation is an amendment to the Constitution [and thus beyond the power of citizen initiative], *contrary to our earlier conclusion*, or that it will have the effect of amending the Constitution, an issue not yet ripe for our consideration.

663 A.2d at 567 (emphasis added). In other words, while questions about the ultimate "effect" of the initiative were not yet ripe for consideration, the Court did rule on the threshold question of its basic nature—whether it was legislation or a constitutional amendment—and found that it was in fact legislation. Here, unlike in *Wagner*, the Initiative, on its face, is not legislation, but instead purports to do something (amend a final decision of the PUC) that the people do not have the power to do by ballot initiative. That issue is ripe for adjudication under the logic of *Wagner*.

The trial court acknowledged that "*Wagner* does appear to allow limited [pre-election] scrutiny of whether an initiative or referendum involves a subject matter beyond the exercise of the people's legislative authority." (A 20.) It concluded, however, that the situation here is different than the examples given in *Wagner* where pre-election review was warranted, because "[t]his case does not present an instance where a procedure specified in the Constitution is inconsistent with the use of the initiative process." *Id*. The trial court understood the door *Wagner* opens to pre-election review to be limited to measures that conflicted with "*procedures* specified in the Constitution," but the holding in *Wagner* did not turn on whether the measure was procedural or substantive. Instead, the question *Wagner* poses is whether the measure deals with "a subject matter beyond the electorate's grant of authority." 663 A.2d at 567. On that score the trial court gave insufficient consideration to Article III, which divides the government into "3 distinct departments," and establishes the rule that "[n]o person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others . . . ." It also overlooked the threshold requirement in Article IV, part 3, section 18 that an initiative must be an "act, resolve, or resolution."

The real question is not whether the rule set by Article III is "procedural" in nature; it is whether pre-election review is warranted here, as it was in the examples cited in *Wagner*, where it is obvious on the face of the Initiative that it violates the constitutional rules governing how laws are to be made. In that situation—where it is unmistakable that an initiative is at odds with the constitutional rules—there is no reason for the Court to sidestep the question of its lawfulness based on whether the issue is better characterized as "substantive" or "procedural." The substantive/procedural distinction is irrelevant to the problem with the Initiative, which is that it deals with a subject matter beyond the electorate's grant of authority and is precluded by the Constitution on its face. That question requires no inquiry into the effects of the Initiative once enacted and is suitable for review now.

Further support for ruling now on the lawfulness of the Initiative is found in *Lockman v. Sec'y of State*, where this Court held that a portion of a constitutional challenge to a ballot initiative was not ripe for review—but again for reasons that support the opposite outcome here. 684 A.2d 415 (Me. 1996). The question that was not ripe for review in *Lockman* was whether an initiative that would impose timber harvesting rules and clearcutting limits would "substantially alter" the use of state lands, which requires a "vote of 2/3 of all the members elected to each House." *Id*. at 420 (quoting Me. Const. art.

IX, § 23). The Court held that the question was not ripe because "[w]hether the legislation has the effect of substantially altering the use of state lands depends on the happening of future events and is not presently ripe for judicial decision." *Id*. That conclusion made good sense on the facts of *Lockman*: before the Court could determine whether legislation imposing timber harvesting rules and clearcutting limits would "substantially alter" the use of state lands, it would need to determine whether the legislation—which was plainly legislative in nature—would indeed as a factual matter have that effect under the circumstances which would exist only after it became effective.

Here, however, the Initiative is not legislative in nature, and therefore cannot be a lawful subject of a ballot initiative. *See Allen v. Quinn*, 459 A.2d 1098, 1098 (Me. 1983) ("By adding the direct initiative and referendum provisions to the Maine Constitution in 1909, the people took back to themselves part of the *legislative* power that in 1820 they had delegated entirely to the legislature." (emphasis added) (footnotes omitted)). Unlike in *Lockman*, where the constitutional question turned on effects of the initiated legislation that would have to be ascertained, if passed by the voters, after it became effective, the question here—whether the Initiative is even legislation in the first place—is squarely presented on the existing record and is ripe for

decision now. There is no need to wait to see what effect the Initiative would have if it were to pass, as its purpose and effect are evident on its face, and do not depend on post-enactment events. The record would not be improved by delaying judicial review until after the election, as there are no material facts that could change. The issue presented is concrete and ripe today.

Sealing the point, the *Lockman* Court evidently found a second question—whether a two-thirds vote of both Houses was required to approve the initiated legislation—to be ripe for decision, as it went ahead and answered it. *See* 684 A.2d at 419 ("We now hold that [Me. Const. art IV, pt. 3,] section 16 applies to acts and resolves that have the force of law and does not apply to the approval of competing measures that will become law only if approved by the voters."). The Court recognized that the issue could be decided on the record before it, as there was no need to inquire into future consequences. The Court should do the same here.

The trial court acknowledged that "the separation of powers issue [this case presents] is a question deserving of serious consideration." (A. 24.) But it concluded that because the Initiative "has not been presented to the voters," and thus "may or may not be enacted," a decision on the lawfulness of the Initiative now "would resemble an advisory opinion." (*Id*.) That is simply not correct. A decision that the Initiative exceeds the people's power to act by

ballot initiative would not be an advisory opinion—instead, it would resolve the dispute over whether the Initiative should appear on the November ballot, and there would be no vote. It is of course possible that the voters could reject the Initiative if it appeared on the ballot, at which point there would be no need or opportunity for the Court to later rule on its constitutionality. But the question this case presents now is whether the Initiative should appear on the ballot in the first place. The Court's decision on that question would in no sense be "advisory."

The trial court was persuaded by the argument that because Article IV, pt. 3, § 18(2) of the Maine Constitution provides that "legislation proposed by initiative, unless enacted without change by the Legislature, '*shall* be submitted to the electors,'" an initiative must be placed on the ballot even if it is not a lawful exercise of legislative power and would therefore be unconstitutional. (A. 19.) One problem with the trial court's reasoning here is that Section 18 requires that "legislation" proposed by citizen initiative be submitted to the electors, but the Initiative at issue here is not "legislation." Moreover, the 1996 *Opinion of the Justices* the trial court cites for this proposition was answering the narrower question "*must the Legislature submit* an initiated bill without any amendment to the voters at referendum, notwithstanding the fact that the bill is unconstitutional as written?" 673 A.2d

693, 697 (Me. 1996) (emphasis added). The rule that the Legislature must submit an initiated bill to the voters does not preclude judicial review of the initiated bill the Legislature has submitted. The trial court also relied on a 2004 *Opinion of the Justices* on this point (A. 19), but the portion of the opinion the trial court cited was authored by justices writing in dissent. *See Opinion of the Justices*, 2004 ME 54, ¶ 32, 850 A.2d 1145, 1153 ("We do not concur in the opinion of our colleagues on the Court . . . ."). In any event, as the trial court acknowledged (A. 19), opinions of the justices are not binding precedent.

The constitutional requirement that legislation proposed by initiative "shall be submitted to the electors" by the Legislature makes good sense. The reason the initiative mechanism exists is to let the people override the Legislature's will. If the Legislature could decline to submit initiated legislation to the people, their power to legislate by citizen initiative would be illusory. The "shall" language is necessary to prevent *the Legislature* from reclaiming the legislative power the Constitution gives to the people; it does not foreclose judicial review to determine whether an initiative is a piece of legislation to begin with.

B. The people should not be asked to vote on an unlawful initiative.

In addition to being supported by this Court's precedents, proper respect for the citizens of Maine—and for the initiative mechanism itself—requires that the people not be asked to participate in what would amount to a sham election on a ballot question they do not actually have the power to decide. Courts in other states have ably articulated this principle. In issuing a pre-election ruling that a ballot initiative was beyond the people's legislative power, the Pennsylvania Supreme Court reasoned that "since . . . we are convinced that the legislation is in fact invalid, it would seem to us to be wholly unjustified to allow the voters to give their time, thought and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain . . . ." *Schultz v. City of Philadelphia*, 122 A.2d 279, 283 (1956). Likewise here, because the Initiative purports to do something the people cannot do, they should not be required to give their time, thought, and deliberation to it, as would happen if the Initiative were to remain on the ballot notwithstanding its facial invalidity. As the Editorial Board of the *Bangor Daily News* has put the point,

> Call us old-fashioned, but we feel strongly that when voters weigh in on a referendum question, they should be confident that the proposal lines up with the Maine Constitution and existing law.

Voters Should Have Clear Answers About Referendum Questions and Constitutionality, Bangor Daily News, May 7, 2019.[2]

"The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot." *City of San Diego v. Dunkl*, 103 Cal. Rptr. 2d 269, 277 (2001) (quotation marks omitted). "It will confuse some voters and frustrate others . . . ." *Id*. (quotation marks omitted). Indeed, "[t]he voters, having been apparently assured that the measure would be effective if approved, would not unreasonably feel betrayed when the court later entertained a new challenge which proved successful." *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 653 n.5 (1991). IECG notes that this point has equal force whether the problem that makes the initiative unlawful is "substantive" or "procedural"—the insult to voters who are presented with an unlawful initiative is the same either way.

There is a simple way to avoid frustrating, confusing, and betraying the voters by asking them to weigh in on an obviously unlawful non-legislative

[2] Available at: https://bangordailynews.com/2019/05/07/opinion/editorials/voters-should-have-clear-answers-about-referendum-questions-and-constitutionality/

initiative: the Court may declare it to be invalid before it goes any further. The danger of letting an invalid measure remain on the ballot is that "an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure." *See Dunkl*, 103 Cal. Rptr. 2d at 277 (quotation marks omitted); *see also Senate of Cal. v. Jones*, 988 P.2d 1089, 1096 (Cal. 1999) ("[D]eferring a decision until after the election . . . may contribute to an increasing cynicism on the part of the electorate with respect to the efficacy of the initiative process."). To preserve public faith in the initiative mechanism, its proponents should demand nothing less.

C. Pre-election review of the lawfulness of citizen initiatives is the rule in other states.

The conclusion that questions about the lawfulness of an initiative should be resolved before an election is held is supported by decisions of courts around the country that have exercised pre-election authority to remove from the ballot purported initiatives that exceeded the scope of constitutional or statutory initiative authority.[3] The Supreme Court of Nevada

[3] *See*, *e.g.*, *Philadelphia II v. Gregoire*, 911 P.2d 389, 394 (Wash. 1996) ("The idea that courts can review proposed initiatives to determine whether they are authorized by . . . the state constitution is nearly as old as the amendment itself.") (citations omitted); *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999) (recognizing "pre-election review of challenges to ballot initiatives" to ascertain whether [the initiative] complies with the particular constitutional and statutory provisions regulating initiatives.") (citation and quotation

has held that "the requirement that an initiative propose only legislation is a threshold requirement, and an initiative that fails to meet the threshold is void," reasoning that "[t]here is little value in putting a measure before the people that they have no power to enact." *Glover v. Concerned Citizens for Fuji Park and Fairgrounds*,50 P.3d 546, 552 (Nev. 2002). The Supreme Court of Colorado likewise follows the rule that "*before an initiative is placed on the ballot*, a court does have jurisdiction to determine whether the initiative exceeds the proper sphere of legislation and instead attempts to exercise administrative or executive powers." *Vagneur v. City of Aspen*, 2013 CO 13, ¶ 33, 295 P.3d 493, 503 (citation and quotation marks omitted) (emphasis added). "If the proposed initiatives are administrative, they may not be placed on the ballot pursuant to the people's initiative power." *Id*. In California, "[i]t

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marks omitted); *MEA-MFT v. State*, 2014 MT 76, 374 Mont. 296, 323 P.3d 198 (if an initiative is clearly unconstitutional on its face or has been improperly submitted, courts may remove it from the ballot); *Carter v. Lehi City*, 2012 UT 2, 269 P.3d 141, n.58 (pre-election challenges to the facial validity of direct legislation, *i.e.*, whether the direct legislation process may be invoked, are justiciable); *Burnell v. City of Morgantown*, 558 S.E.2d 306, 314 (W. Va. 2001) ("a court may undertake pre-election judicial review of a proposed voter initiative or referendum" that is "alleged to either (1) violate procedural or technical requirements incident to placing the measure on the ballot, or (2) involve a subject matter that is beyond the scope of the initiative or referendum power."); *State ex rel. Trotter v. Cirtin*, 941 S.W.2d 498, 500 (Mo. 1997)("Prior to presentation of an initiative to the people, … [courts'] single function is to ask whether the constitutional requirements and limits of power, as expressed in the provisions relating to the procedure and form of initiative petitions, have been regarded.") (citations and quotation marks omitted); *Cox v. Martin*, 2012 Ark. 352, 423 S.W.3d 75 (endorsing pre-election review of "whether the measure's proponents are entitled to invoke the direct legislation process at all," as opposed to "the hypothetical question whether the law, if passed, would be constitutionally defective" (citations and quotations omitted)).

is well accepted that preelection review of ballot measures is appropriate where the validity of a proposal is in serious question, and where the matter can be resolved as a matter of law before unnecessary expenditures of time and effort have been placed into a futile election campaign." *Dunkl*, 103 Cal. Rptr. 2d at 273 (citations omitted). Pre-election review of challenges "to the power of the electorate to adopt the proposal in the first instance" is proper because "the question raised is, in a sense, jurisdictional." *Am. Fed'n of Labor v. Eu*, 686 P.2d 609, 614 (Cal. 1984).**Error! Bookmark not defined.**

Courts have drawn a distinction between (1) whether an initiative on its face presents a proper question for the voters to decide, and (2) whether an initiative that on its face presents a proper question for the voters to decide would in fact be constitutional if enacted, and have answered the first question before an election has been held. The authority to initiate legislation is restricted in various ways by constitutions and statutes: it may be restricted categorically (*e.g.*, the measure must be legislative in nature); procedurally (*e.g.*, specified numbers of signatures must be submitted); or based on subject-matter (*e.g.*, the measure cannot interfere with free exercise of religion). When an initiative is *ultra vires* and therefore void, courts will intervene to save the voters from engaging in the meaningless and confusing act of voting on it. Because it is a threshold question that goes to the authority

of the people to act by initiative in the first place, the question of whether a measure falls within the initiative power is ripe before an election is held. It would make no sense for courts to wait to rule on this threshold question until after there has been an unlawful election.

By contrast, courts are less inclined to intervene before an election to evaluate an initiative that appears to be lawful and within the scope of the initiative power. Consider, for example, an initiative that on its face meets the constitutional prerequisites for initiated legislation, but that would, if enacted, violate the dormant Commerce Clause. Courts generally do not intervene before the election in this situation because the constitutional question (whether a measure that is legislative in nature would be constitutional if enacted) is not squarely presented until the law is on the statute books and its effects on the rights of others are at issue. Here, however, the threshold question of whether the Initiative is even something the people should be voting on in the first place is squarely presented now.[4]

[4] Some jurisdictions go further and engage in pre-election review of whether a proposed initiative would be unconstitutional if enacted. For example, the Kentucky Supreme Court upheld a trial court's pre-election determination to "not permit[] the charade of a vote on an invalid amendment," affirming that "[t]here is no right to obtain a vote of the people upon the enactment of legislation that would be invalid if approved by them. The court ought not to compel the doing of a vain thing and the useless spending of public money." *Goodloe v. Baesler*, 539 S.W.2d 298, 300 (Ky. 1976) (citing *Utz v. City of Newport*, 252 S.W.2d 434, 437 (Ky. 1952)).

In an observation that resonates here, the Nebraska Supreme Court has said that "to permit a referendum to be invoked to [annul] or delay executive action would be to destroy the efficiency necessary to successful administration of the business affairs of a municipality"—or here, a state. *Kelley v. John*, 75 N.W.2d 713, 716 (Neb. 1956). The initiative should not become a means to "permit the electors by referendum to change, delay, and defeat the real purposes of [a] comprehensive zoning ordinance"—or here, a statutory scheme for PUC approval of energy infrastructure projects—"by creating the chaotic situation such ordinance was designed to prevent." *Id*. The Supreme Court of Colorado has likewise ruled that an initiative could not be used to take "the product of a lengthy, multi-agency administrative process" to design a highway—a processes that, like the PUC process here, "reflected case-specific evaluation, specialized knowledge, and technical expertise"—and replace that process, "not with a generally applicable rule or a new governing standard, but simply with a different highway design." *Vagneur*, 2013 CO 13, ¶ 59; *see also id*. at ¶ 54 (rejecting as non-legislative an initiative that "attempt[ed] to reverse administrative decisions . . . and dictate the future course of such decisions." (quotation marks omitted)). "The rule that only legislative, as opposed to executive/administrative, decisions are subject to the initiative and referendum has generally been justified both by

the requirements of the efficient administration of government, and by the separation of powers doctrine." *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 871, 875 (D.C. 1980), *aff'd on reh'g*, 441 A.2d 889 (D.C. 1981). The same logic applies here. IECG's members are concerned that allowing this facially invalid question to go to the voters will establish a precedent that such initiatives can be used to delay projects long after their permits have been issued and affirmed on appeal.

D. The lawfulness of the Initiative is ripe for review.

In the trial court's view, the issue of whether to "undertake pre-election review of plaintiffs' challenge to the initiative" is "broader than ripeness." (A. 18.) In the trial court's view, "[r]ipeness is a prudential doctrine, but there is an additional issue of whether, under the circumstances of this case, pre-election review is available as a matter of law." (*Id*.) Here the trial court appears to have had in mind the "shall be submitted to the electors" language in the constitution, which is addressed in section B *supra*. That leaves the prudential ripeness doctrine, which also is no bar to pre-election review. There is no future time when it will be ripe to decide whether the initiative should appear on the ballot: it's now or never.

"Ripeness is a two-prong analysis: (1) the issues must be fit for judicial review, and (2) hardship to the parties will result if the court withholds

review." *Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶ 20, 221 A.3d 554, 560. Here these requirements are met. The issue of whether the Initiative is a lawful exercise of the people's power to legislate by ballot initiative that should appear on the November ballot is "fit for judicial review," as the Court needs nothing more than the text of the Initiative and the relevant constitutional provisions to conduct that inquiry; nothing material will change between now and the effective date of the Initiative. And hardship to IECG members and to the public interest will result if the Court withholds review, as the placement of the unconstitutional Initiative on the ballot could cause substantial delay in the construction and operation of the NECEC project and thus delay the realization of its benefits by Maine energy consumers, including IECG members (including over $250 million in financial benefits under the stipulation approved by the PUC and joined in by IECG; less expensive and more reliable electricity for all Maine consumers; and a reduction in the adverse impacts of regional electricity generation, transmission, distribution, and consumption, including the emission of millions of tons of greenhouse gases. *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n,* 2020 ME 34, ¶ 8 n.9, 227 A.3d 1117; *see also* A. 30-31, Avangrid Compl. ¶¶ 22–27. And then there is the project-delaying precedent that would be set.

"The doctrine of ripeness prevents judicial entanglement in abstract disputes, avoid[s] premature adjudication, and protect[s] agencies from judicial interference until a decision with concrete effects has been made." **Error! Bookmark not defined.***Id.* at ¶ 17 (quotation marks omitted). Whether the Initiative is a lawful exercise of the people's power to legislate by ballot initiative that should appear on the November ballot is not an abstract dispute, but an actual, concrete and immediate one—the Initiative either will or will not appear on the ballot, depending on how the Court rules. That being so, adjudication of the question at this time would not be premature. As for protecting agencies from judicial interference until a decision with concrete effects has been made, the PUC made a decision that has concrete effects (permitting the construction of NECEC project), and so did the Secretary (validating sufficient signatures to put the Initiative on the ballot). The placement of the Initiative on the ballot "is not merely an abstract" or "tentative" step; it is "a concrete, firm disposition of rights and obligations . . . in form and substance sufficiently definitive to be suited to a judicial evaluation and determination of the constitutional issues it precipitates." *Lewiston, Greene & Monmouth Tel. Co. v. New England Tel. & Tel. Co.*, 299 A.2d 895, 908 (Me. 1973). The issue before the Court is ripe for review, and the Court should decide it.

Actions by the Legislature itself cannot be challenged in court (are not ripe for judicial review) until a measure has assumed its final form. That happens when a bill is enacted into law—at that point the bill can no longer be amended or vetoed, and judicial review is appropriate. The same principle limits judicial review of actions by the executive branch to *final* agency actions. In the case of an initiative, a measure assumes its final form when it is submitted to the Secretary of State. At that point the measure cannot be changed, and once the initiative's procedural validity is confirmed and the Legislature adjourns without adopting it, the Secretary is bound to place the initiative on the ballot, and judicial review is appropriate. The people can vote up or down, but the thing they are voting on is set in stone, and therefore fit for judicial review. The Court should decide now whether the Initiative should appear on the ballot.

E. We are not destined to repeat the past.

The doctrine of separation of powers emerged in America, including in the Massachusetts Bay Colony, in response to experiences in colonial governance that bear a striking resemblance to the facts of this case. "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which . . . had produced factional strife and partisan oppression." *Plaut*, 514 U.S. at 219. "[C]olonial assemblies and

legislatures" would often "correct the judicial process through special bills or other enacted legislation," and "[i]t was common for such legislation not to prescribe a resolution of the dispute, but rather simply to set aside the judgment and order a new trial or appeal." *Id*. In response to this, a "sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution." *Id*. at 221. "Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them." *Id*. The Maine Constitution too is based on the separation of powers. *See Ex parte Davis*, 41 Me. at 53 ("Each of the three departments being independent . . . are severally supreme within their legitimate and appropriate sphere of action. All are limited by the constitution. . . . The legislature are powerless . . . to legislate in violation of, or inconsistent with, constitutional restraints."). Under the Maine Constitution, "when, if ever, the executive or legislative departments have exercised in any respect a power not conferred by the constitution, . . . we have seen that the judiciary is not only permitted but

compelled to sit in judgment upon such acts, and bound to pronounce them valid or otherwise." *Id*. at 53–54.

This wisdom has not faded with time. If the Initiative were permitted to go forward, then any permit issued by the executive branch, even after it had been affirmed by the judicial branch, could be subject to reversal by legislative command. This would render political, in the legislative sense, decisions that have long been delegated to expert agencies, and discourage investment in essential infrastructure and the new technologies it supports. This is why Maine's Constitution is built upon the separation of powers. The Initiative is precisely the error the separation of powers prohibits.

CONCLUSION

WHEREFORE, Industrial Energy Consumer Group respectfully requests that the Court reverse the decision of the court below and order that the Initiative be removed from the November 2020 ballot.

Dated at Portland, Maine this 13th day of July, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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